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SHAPING OPERATIONAL FACTORS THROUGH TRANSIT AND STATUS OF FORCES AGREEMENTS

by

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Paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations curriculum.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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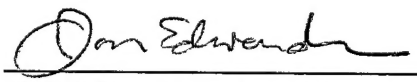

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15.Abstract:

One of the processes fundamental to military operational planning is the development of distinct, effective courses-of-action (COA) for a commander's review and decision. The basic building blocks for a COA are the *forces* available to the commander, the *space* in which US and opposing forces may/must operate, the *time* required for COA execution, and the commander's ability to have the *information* needed by his forces, when and where they need it. When US forces are deployed abroad, imbedded in each of the "operational factors" of *space, forces, time,* and *information* are important foreign and international law issues. This paper's intent is to focus on the major imbedded legal issues that can be resolved through transit agreements and status-of-forces agreements with countries through or to which US troops are being deployed. The paper proposes solutions that allow planners to offer their commander effective COAs, as free of those issues as possible.

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I. Introduction

> *War plans cover every aspect of a war, and weave them into a single operation that must have a single, ultimate objective in which all particular aims are reconciled. No one starts a war . . . without first being clear in his mind what he intends to achieve by that war, and how he intends to conduct it.*[1]

One of the processes fundamental to military operational planning is the development of distinct, effective courses-of-action for a commander's review and decision. The basic building blocks for a course-of-action (COA) are the *forces* available to the commander, the *space* in which US and opposing forces may/must operate, the *time* required for COA execution, and the commander's ability to have the *information* needed by his forces, when and where they need it.[2] Embedded in each of these factors are important foreign and international law issues, which, if identified early by planners, can be resolved in ways that will enhance the flexibility and speed with which US Forces deploy, maneuver and otherwise operate to successfully complete their missions. Operational planners should remain alert to the fact that deployed US forces may be affected by the laws of the state to which they are deployed, in addition to being affected by US laws and regulations. The conclusion of international agreements with foreign governments, in the form of transit and status-of-forces agreements (SOFA),[3] are a means to achieve successful resolution of imbedded foreign and

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[1] Michael Howard and Peter Paret, ed., *Carl Von Clausewitz on War* (Princeton, NJ: Princeton University Press, 1984), 579.

[2] Milan Vego, *On Operational Art* (4th Draft) (Newport, RI: U.S. Naval War College, 1999), 53, 54.

[3] Defined as: "An agreement which defines the legal position of a visiting military force deployed in the territory of a friendly state. Agreements delineating the status of visiting military forces may be bilateral or multilateral. Provisions pertaining to the status of visiting forces may be set forth in a separate agreement, or they may form part of a more comprehensive agreement. These provisions describe how the authorities of a visiting force may control members of that force and the amenability of the force or its members to the local law or to the authority of local officials. . . . Also called **SOFA**." Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms* (PUB 1-02) (Washington, D.C.: March 23, 1994, as amended through April 15, 1998), 411.

international law issues, and should be an important part of the consideration of operational factors during the planning process.

In both deliberate and crisis action planning, US commanders engage in an analysis known as the commander's estimate of the situation (CES).[4] The purpose of the CES is to assist the commander in choosing a COA to accomplish a military mission. Although no one model for conducting a CES is used by all planning staffs, the Navy's "Naval Operational Planning Process" is a good example. As part of the Navy CES, the operational factors of *space*, *time*, and *forces* are analyzed to determine what aspects of these factors might favor or hinder specific COAs.[5]

One of the principal goals of the operational commander must be to obtain and maintain freedom of action for the commander's forces, while denying the same to the enemy's forces.[6] This is primarily achieved by properly balancing the factors of *space*, *forces, time,* and *information* to achieve military objectives.[7]

II. Factor *Space*: Deployment Issues and Transit Agreements

Deploying military forces to locations in the world where they are needed, with the equipment and supplies needed to successfully perform their mission, more often than not will require the deployment of forces through the sovereign air space, territorial waters, or sovereign land of another nation. Under international law, each state is sovereign within its

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[4] Joint Chiefs of Staff, *Joint Operation Planning and Execution System Volume I (Planning Policies and Procedures)* (Joint Pub 5-03.1) (Washington, D.C.: August 4, 1993), III-9, V-11, D-1-1, D-2, P-6-1.

[5] Department of the Navy, *Naval Operational Planning* (NWP 5-01, Rev. A) (Norfolk, VA: May, 1998), 4-7.

[6] Vego, 53.

[7] Naval War College Joint Military Operations Department, *Joint Military Operations Syllabus 2000,* "Operational Factors (Seminar)," OPS SESSION I-4, (Newport, RI: College of Naval Warfare Naval Command College 2000), 30. Because of the current emphasis on information technology and its ability to link space, time, and forces, **information** has become a significant operational factor. Vego, 54.

territory (including its national airspace, internal waters, and territorial sea). Sovereignty involves a state's lawful authority within a given territory, generally to the exclusion of other states, to govern and apply laws there.[8] Deploying forces through the sovereign territory of another nation has always been problematic. Commenting on the Peloponnesian Wars and Brasidas' deployment of troops from Sparta to Macedonia in 424 BC, Thucydides observed that:

> *It was never very easy to traverse Thessaly without an escort; and throughout all Hellas for an armed force to pass without leave through a neighbor's country was a delicate step to take . . . Indeed, if instead of the customary close oligarchy there had been a constitutional government in Thessaly, he [Brasidas] would never been able to proceed.*[9]

Today sovereign nations still jealously guard the prerogatives of sovereignty, making transiting or operating within another nation's territory a precarious matter. In June of 1999, when 200 Russian paratroopers sprinted to Kosovo to occupy the airport at Pristina, the Russian intent was to fly in additional forces in order to establish Russian control of a defined sector of Kosovo.[10] The latter portion of this plan was stymied because Hungary, Rumania, and Bulgaria, which lie between Russia and Kosovo, would not grant Russia permission to fly military aircraft through their airspace.[11]

When operational planners develop a COA that includes the passage of forces through another state's territory, they ordinarily should confirm that the state has agreed to

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[8] American Law Institute, *Restatement of the Law, The Foreign Relations Law of the United States*, §206 Comment b, "Sovereignty," (St Paul, Minn.: American Law Institute Publishers, 1986), 94.

[9] Robert B. Strassler, *THE LANDMARK THUCYDIDES: A comprehensive Guide to the Peloponnesian War* (New York: The Free Press, 1996), 266.

[10] Joseph Fitch, "Clark Recalls 'Lessons' Of Kosovo," *International Herald Tribune*, 3 May 2000. <http://ebird.dtic.mil/May2000/e20000503clark.htm> (3 May 2000).

[11] Tom Whitehouse, "Moscow fumes as NATO blocks airlift," *The Guardian Observer*, 5 July 1999. <http://www.guardianunlimited.co.uk/Kosovo/Story/0,2763,63246,00.html> (23 April 2000).

the passage of troops and equipment. Generally, this involves an international agreement known as a "transit agreement." In some limited cases, a transit agreement may not be needed. Warships and commercial vessels enjoy certain limited rights under international law, to pass through the territorial waters of coast states and island nations, even in the absence of a transit agreement.[12] Military and commercial aircraft enjoy no such rights of innocent or transit passage through a foreign state's territorial airspace, as those accorded to sea going vessels.[13]

One obvious impediment to the operational planner would be the total denial of any transit or use of a country's territory, for purposes of a proposed operation, when that country's territory lies under a proposed line of operation (LOO) [14] or line of communication (LOC).[15] In such a case, more circuitous LOOs and/or LOCs may be required, which may, in turn, deny the plan such things as speed, surprise, maneuverability, and the ability to rapidly replace personnel and logistics. In the worst case, it could deny the planner the ability to formulate a successful plan at all, as it did to the Russians in Kosovo.

If forces are merely transiting a country by air or through its territorial waters, one might assume that only an agreement for the basic transit of airspace/waters would be

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[12] *See generally,* A.R. Thomas and James C. Duncan, ed., *INTERNATIONAL LAW STUDIES: Vol. 73, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, §2.3, "Navigation in and Overflight of National Waters" (Newport, RI: Naval War College, 1999), 109, *et seq. See also,* American Law Institute, *Restatement of the Law, The Foreign Relations Law of the United States*, §513 "Passage through Territorial Sea, Straits, and Archipelagic Waters," (St Paul, Minn.: American Law Institute Publishers, 1986), 44, *et seq.*

[13] *Op Cit*, 50.

[14] Defined as: "Lines which define the directional orientation of the force in time and space in relation to the enemy. They connect the force with its base of operations and its objectives." Joint Chiefs of Staff, *Doctrine for Joint Operations* (Joint Pub 3-0) (Washington, D.C.: February 1, 1995), GL-9.

[15] Defined as: "A route, either land, water, and/or air, which connects an operating military force with a base of operations and along which supplies and military forces move." Joint Chiefs of Staff, *Department of Defense*

necessary. But the thoughtful planner needs to consider the desirability of arranging, in advance, for the possible unplanned diversion of a military aircraft or a naval vessel to intermediate air/sea ports, and seek some temporary basic status arrangements.

III. Factor *Space*: Basing and Operational Maneuver and SOFAs

The sovereignty of other states (other than the enemy) will also affect the ability of deployed US forces to maintain bases of operation or conduct other military operations within those states. Planners, in COA analysis, must identify such states. The same sovereignty rights that require the United States to obtain permission to deploy through another state, also require it to obtain permission to base within and operate from another state. Normally, permission to obtain basing and operating rights are obtained through international agreements with the governments hosting US forces in their territory for this purpose. The agreement is ordinarily part of a SOFA.[16] In this writing, "SOFA" includes within its scope, three types of agreements. The first type of status is a quasi-diplomatic status that is essentially equivalent to that of the administrative and technical staff of the US Embassy (A&T status[17]). The second is a mini-status-of-forces agreement (mini-SOFA) that

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Dictionary of Military and Associated Terms (PUB 1-02) (Washington, D.C.: March 23, 1994, as amended through April 15, 1998), 253.

[16] Planners must be careful to avoid attempts to interpret a SOFA merely from the bare words of its text. Typically, there are an array of documents and a negotiating history that must be reviewed in order to understand what a particular word or phrase means in a SOFA. For example, in the case of the US-Japan SOFA, in addition to the basic document, there are "Agreed Minutes" to the SOFA, "Agreed Views" to the SOFA, over forty years of US-Japan Joint Committees minutes, and agreements interpreting the SOFA, plus several filing cabinets of documents reflecting negotiations between the two governments, all of which must be consulted in order to accurately interpret the agreements between the two countries. The SOFA and some of the other documents may be found at < http://www.yokota.af.mil/usfj/Library.htm>, while others exist only in the files of USFJ/J06.

[17] "Vienna Convention on Diplomatic Relations," 18 April 1961, *United States Treaties and Other International Agreements*, T.I.A.S. 7502 v. 22, 3227. A&T status personnel are generally immune from local criminal laws, and civil suits for acts performed as part of their official duties. *See also* Law Institute, *Restatement of the Law, The Foreign Relations Law of the United States*, §464 (Comment a) "Immunity for diplomatic agents, their families and staff," (St Paul, Minn.: 1986), 458.

is an abbreviated SOFA designed for a specific purpose. The third is a more complete SOFA of the type that exists in states where the United States stations troops long term, such as Japan, Korea, and NATO countries.

Because of space and logistical constraints within a state in which US forces may be involved in an armed conflict, it is often necessary to stage out of other sovereign states, as the United States staged its Libyan air attacks out of England and currently stages Northern Watch flights out of Turkey. In the case of Military Operations Other Than War (MOOTW), SOFAs may be necessary for staging and destination states. For example, a mini-SOFA was required with Kenya during the Rwanda crisis, because the limited capabilities of the Rwandan airport resulted in staging most of the aid through Nairobi. The Mozambique crisis this year is a recent example of a mini-SOFA with a destination state. When the United States decided to assist Mozambique, the Staff Judge Advocate for Third Air Force, US Air Forces Europe was dispatched to the US Embassy in Mozambique, where he had a "mini-SOFA" negotiated and signed within 24 hours.[18]

If another state allows US forces to pass into its sovereign territory, many potential pitfalls remain. Poor receiving states may potentially view US forces as a source of revenue to fill sagging government coffers through the application of various fees and taxes to the activities of the forces. For example, when Japanese medical teams flew into Rwanda in 1994 to provide aid to that country, they were charged extremely high landing fees by the government that they had come to help.

Planners must establish where they will be permitted to locate bases; where they can store supplies, equipment, weapons, and ammunition; and any domestic legal limitations on

[18] Col Karl A. Kaszuba, <Karl.Kaszuba@mildenhall.af.mil> "RE: US-UK SOFA." 25 April 2000. Office communication. (25 April 2000).

such storage or on access to the storage locations. Any grants of host nation support to US forces in the form of use of facilities and areas within the country should be memorialized, along with provision for the establishment of procedures to implement the support.

If another state agrees to permit US military forces over or into its territory, various questions arise. Where are those forces permitted to enter and exit the state's territory; where and under what conditions may they be present; what activities may they undertake; what routes and modes of transportation may be available to them; and to what laws, fees, or charges may they be subject? The answers to these questions will have a direct effect on the US force's use of space within that state. Availability of crucial space within the country must be assured through prior agreements. Presence of the forces may not be very popular with the local population, and trying to make agreements after the forces have arrived may be quite difficult. Accessibility of airports, seaports, railways, and roads for use by the forces should be delineated before operational plans are finalized.

SOFAs define who the United States may bring into a foreign state as members of a US force, including service members, civilian employees, and their dependents. Some SOFAs also address contractor personnel, but many do not. The operational planner must be aware of the total composition of the proposed force, and assure that all necessary categories are included within status agreements.

Under the terms of a SOFA, the United States will generally undertake an obligation to take all measures within its authority to ensure the compliance by its forces of all local

laws that remain applicable to the forces.[19] Hence, a planner must coordinate closely with the servicing judge advocate for a thorough analysis of an operation, and a determination that the application of local laws that will inhibit the performance of the official duties of the forces are waived to the maximum extent possible. If a country intends to insist on certain restrictions, the planner must be aware of and take into account any such restriction that will affect his operational plans.

There are numerous other SOFA provisions that can facilitate the movement of US forces into a state. Immigration procedures should clearly identify who is entitled to enter and remain in the country. Customs procedures must identify what equipment and supplies US forces may bring into the country. Typically, the United States seeks an agreement that permits bringing in all personnel, equipment, and supplies necessary to support the operational plan. US forces personnel should be exempted from paying domestic income taxes and property taxes on any personal property they may bring with them or purchase during their deployment.

Delays due to civil disputes should also be addressed. Civil jurisdiction of local courts over US forces personnel, for acts arising out of the performance of official duty, should be waived. Any actions should be against the United States, to the extent the United States has agreed to waive sovereign immunity. Typically, a claims process would be agreed upon that would waive most government-to-government claims, and establish procedures to handle those not waived, plus third-party private claims.

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[19] *See e.g.*, "Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces," 4 April 1949, *United Nations Treaties Series*, T.I.A.S. 1964, v. 34, 243 (hereafter the NATO SOFA).

> Article II. It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measures to that end.

All domestic fees and taxes related to moving or basing of personnel, equipment, or supplies, with the possible exception of those fees that directly correlate with out of pocket expenses of the local government, should be waived. Other matters that should be reviewed are access to local utilities at a fair price and the right of Morale, Welfare and Recreation (MWR) activities (for the use of forces personnel only[20]) to be operated free of any local controls, taxes, or customs duties.

IV. Factor *Forces*: Privileges and Immunities

As a rule, when US troops are in the sovereign territory of a foreign nation, all of the laws of that nation and its subdivisions apply to the troops, unless the foreign country has specifically agreed otherwise.[21] Relief from constraining local laws, plus obtaining certain "special privileges" for US forces, may be crucial to the success of any overseas deployment. Except in the most unusual cases, an analysis of operational plans that call for overseas deployment of US military forces should be made to determine whether a SOFA is necessary.[22]

One of the primary functions of a SOFA should be to obtain primary criminal jurisdiction over as much of the force as possible. In the best case, the United States retains *sole* criminal jurisdiction. For example, in Desert Storm, the United States successfully

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[20] Commanders must understand that concessions made for the operation of MWR activities are made only for US forces personnel. If the United States permits non-US forces personnel to access MWR activities, without the express permission of the host country, the United States violates the agreement, almost surely violates local law, and deprives the host government of taxes to which it is entitled.

[21] American Law Institute, *Restatement of the Law, The Foreign Relations Law of the United States*, §461f "Military Forces of Foreign States," (St Paul, Minn.: American Law Institute Publishers, 1986), 442. *See also, Wilson et. al. v. Girard*, 354 US 524 (1957), 529. The *Girard* case involved Japanese criminal jurisdiction over a US military member for a crime committed in Japan. In that case, the United States Supreme Court stated that, "[A] sovereign state has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."

[22] Department of the Army, The Judge Advocate General's School, *Operational Law Handbook* (JA 422) (Charlottesville, VA: 1998), 4-3 (hereafter the *OpLaw Handbook*).

retained exclusive jurisdiction over its personnel in Saudi Arabia. In the more general case, the United States retains sole jurisdiction in crimes that are violations of US military law, but not violations of local law; and the United States retains *primary* jurisdiction in the case of offenses solely against the property or security of the United States, or solely against members of US forces or their property. The United States always insists on primary jurisdiction for offenses arising out of any act or omission done in the performance of official duty.[23] In the latter case, determinations of what constitutes "official duty" should be within the sole discretion of US authorities. These criminal jurisdiction protections are important

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[23] Article VII [NATO SOFA] states:

1. Subject to the provisions of this Article,
    a. The military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.
    b. The authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.
    a. The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
    b. The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending state.
    c. For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include:
        i. treason against the State;
        ii. sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State
2. In case where the right to exercise jurisdiction is concurrent the following rules shall apply:
    a. The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
        i. offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
        ii. offences arising out of any act or omission done in the performance of official duty.
    b. In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.
    c. If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other state considers such waiver to be of particular importance.

for two very different reasons. First, many of the activities of a military person may appear to be inappropriate to local civilian authorities, e.g., carrying weapons, discharging them, injuring other persons, wearing military uniforms, etc. US forces commanders clearly wish to avoid misunderstanding or attempts by local officials to arrest members of the force for acts that constitute performance of their duty. Also, US forces commanders do not wish to engage in disagreements with local officials concerning what is and what is not "official duty."[24] The second reason is the Congressionally mandated Department of Defense (DoD) policy to maximize US constitutional protections for US personnel present in other countries, solely due to military orders.[25] DoD attempts to accomplish this by tasking the regional Combatant Commanders (CINCs) to maximize the exercise of US military criminal jurisdiction over US personnel in their region.[26] The medium for accomplishing this is normally jurisdictional agreements in SOFAs. For the planner, the primary concern is that local arrests of US forces personnel will deprive the forces of a portion of its personnel. Also, the holding of US forces personnel in local detention facilities can be demoralizing to the detainee, as well as other US forces personnel.[27]

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[24] In Japan a case arose where a military member, while guarding a firing range, shot and killed a Japanese citizen who was trespassing on the range for the purpose of collecting brass. Japanese law on the use of firearms by police and military in peacetime is very limited and would not permit the use of deadly force against an unarmed thief. The Japanese Government argued strenuously that such a use of firearms could not be part of the security guard's official duty; therefore, Japan had primary jurisdiction. The United States insisted that it had the sole right to determine official duty, that the soldier was performing his duty when he fired the weapon; and therefore, the United States had primary jurisdiction.

[25] *See generally*, Department of Defense, *Status of Forces Policies and Information*, Directive 5525.1 (Washington: 7 August 1979, incorporating through Change 2, 2 July 1997).

[26] DoD Dir. 5525.1, §4.6.1, at 4.

[27] When operational commanders are planning participation in UN operations, it will be useful for them to be aware that the UN forces enjoy complete immunity from local jurisdiction. Serge Lazareff, *Status of Forces Under Current International Law*, (Leyden: A.W. Sijhoff, 1971), 39. UN operations enjoy the status, privileges and immunities of the United Nations, as provided for in *The Convention on the Privileges and Immunities of the United Nations (Cite* of 13 February 1946). A Model UN Status of Forces Agreement serves as the basic document signed by a country receiving UN military forces. *The OpLaw Handbook,* 12-17, *et seq.*

V. Exceptions to Need for SOFA

In the past, it was asserted that under some circumstances, a state waived its right to apply its laws to foreign troops temporarily in its territory. Historically speaking, there is precedence for the proposition that, if a nation authorizes foreign troops to pass through its territory, that authorization, in the absence of any limiting conditions, implies a waiver of its right to apply its laws to the visiting forces, and further implies that the sending state agrees to appropriate enforcement actions according to the sending state's laws.[28] There has been considerable misunderstanding about this principle of international law, leading to a misconception by some military officers that only US law applies to US forces whenever they deploy abroad. As indicated above, nothing could be farther from the truth. The uncertainty of the "consent to pass through" exception has, since 1941, caused US military forces not to rely on it when deploying forces.[29]

One exception recognized by customary and conventional law of armed conflict to the general rule that the law of a sovereign state applies to visiting forces, is when military forces within a state are engaged in combat with forces of that state,[30] including occupying territory of the opposing state.[31] At such times, the "Law of the Flag" (US forces are subject only to US law) is the "jurisdictional default," and US forces are immune from local laws.[32] A second and related exception recognized by recent US practice considers this

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[28] *Schooner Exchange v. McFaddon*, 11 US (7 Cranch) 116, 140 (1812).

[29] CAPT Jon Edwards, Professor of Joint Military Operations at the Naval War College, conversation with author, 5 May 2000, Naval War College, Newport, RI.

[30] *Schooner Exchange v. McFaddon*, 11 US (7 Cranch) 116, 140 (1812); *OpLaw Handbook,* 12-1.

[31] Department of the Army, *Law of Land Warfare* (DA Field Manual 27-10) (Washington D.C.: July, 1956), §374, 143.

[32] Serge Lazareff, *Status of Forces Under Current International Law*, (Leyden: A.W. Sijhoff, 1971), 13.

"jurisdictional default" concept also applicable in cases when there is a jurisdictional "vacuum," where no state exists to exercise jurisdiction over US forces (e.g., Somalia) "or a state is unable to exercise jurisdiction (e.g., Northern Iraq)."[33]

NATO's operations in Kosovo involved an interesting application of the exception during the absence of a legitimate, functional government. Prior to the beginning of the air campaign, NATO addressed the issue of a SOFA for its forces that might be operating within Kosovo, considering that by any standard legal analysis it must be considered part of the territory of Serbia. After more than two weeks of discussions and drafting of possible terms for a SOFA, plus discussions on the challenges of coercing the Serbian Government to sign such an agreement, NATO leaders decided to take the position that because there was no legitimate, functional government in Kosovo, local law did not apply to NATO forces, and the "Law of the Flag" of each ally (US law for US troops), plus applicable international law, would be the operative laws for NATO troops within Kosovo.[34]

VI. Factor *Time*: Effects of Transit Agreements and SOFAs

Having a SOFA/Transit Agreement in place prior to a foreign deployment will often be critical to the timing of phases, as well as the synchronization and maneuver within each phase of a COA. In order to have such an agreement in place when it is needed, commanders and operational planners must allow sufficient lead-time to complete the process for an international agreement. The Office of the Secretary of Defense has identified certain types of international agreements as "having policy significance," and requires that the negotiation and conclusion of such agreements be authorized at the Office of the Undersecretary of

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[33] *OpLaw Handbook,* 12-1.

[34] Frank Stone, Esq., Legal Counsel for the Foreign Military Rights Affairs Office, telephone conversation with author, 11 April 2000.

Defense for Policy level [OUSD(P)].[35] SOFAs have been designated as "having policy significance."[36] Therefore, before any negotiation may begin, approval to negotiate must be obtained from the OUSD(P). A second and separate OUSD(P) approval is required before the final document can be concluded. Typically, once a CINC staff becomes aware of the potential need for such an agreement, they will assist the CINC in preparing a request to the Joint Chiefs of Staff (JCS), asking that the US Government obtain the needed country-to-country agreement.[37] The JCS will then coordinate with the Department of State (DoS), National Security Council, through the Foreign Military Rights Affairs Section, International Security Affairs Division, Office of the Secretary of Defense (FMRA). FMRA then prepares a draft agreement that is transmitted to DoS. Once DoS and FMRA agree on a proposed text, the text is transmitted to the US Embassy/Consulate in the receiving state. DoS and DoD officials arrange a meeting with foreign officials and negotiations begin. Such negotiations can take an extended period of time, especially if the force deployment does not serve an immediate need of the receiving state.

For long term stationing of troops, operational planners should always seek a comprehensive SOFA. In the absence of a comprehensive SOFA, requests for A&T status, or the signing of "mini-SOFAs" are sought for deployments;[38] and if none is obtained, the

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[35] Department of Defense, *International Agreements,* Directive 5530.1 (Washington: 11 June 1987, incorporating Change 1, Feb 18,1991), §8.4.

[36] CAPT Jon Edwards, *Op Cit.* Fn 28.

[37] CAPT Jon Edwards, *Op Cit.* Fn 28. CAPT Edwards also indicated that a SOFA between a US Combatant Commander and his foreign counterpart would be inappropriate due to a lack of authority on the part of the US CINC to conclude a SOFA.

[38] *See e.g.,* USCINCPAC to JIATF, 23 May 1997, Message titled, *LEGAL PROTECTIONS FOR CD MISSIONS,* requires "advance liaison with country team to identify existing protections or to develop any possible temporary legal protection arrangements for the particular mission. In cases where no legal protections exist, and no temporary arrangements are possible, CD mission proposal should describe . . . assessment that

CINC must do a "risk assessment" comparing the risk of the forces being subject to local laws, versus the necessity of the deployment, and send it to JCS for review and approval of the deployment.[39]

The least resistance is usually encountered in obtaining a SOFA for humanitarian relief operations. In Operation Sea Angel, in May of 1991, a US Navy amphibious task force (ATF) was returning from the Persian Gulf, and was steaming in the vicinity of Bangladesh immediately following Cyclone "Marian" striking that country with winds of over 235 kph. Within 24 hours of a request for aid by the Bangladesh Government, the President of the United States re-designated the ATF as a contingent joint task force and diverted it to Bangladesh to provide disaster relief.[40] A mini-SOFA was prepared, negotiated, and signed in 4 days.[41]

If another state authorizes US military forces over or into its territory, operational planners must consider the possible impact of delays that might arise from the application of domestic laws, regulations, and rules to the activities of the forces on the amount of time necessary to move about within a foreign country. A SOFA should maximize the resolution of potential problems. For example, exemptions from immigration procedures such as the necessity for a passport or visa, inspections or restrictions on entering into the country, as well as regulations governing the residence of aliens in the country, will greatly speed up the

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need to accomplish particular mission outweighs risks associated with putting US personnel in country absent legal protections."

[39] Frank Stone, Esq., Legal Counsel for the Foreign Military Rights Affairs office, telephone conversation author, 11 April 2000.

[40] Joint Chiefs of Staff, *Joint Doctrine for Military Operations Other Than War*, (Joint Pub 3-07) (Washington D.C.: 16 June 1995), Ch III. *See also*, "Operation Sea Angel / Productive Effort," *FAS Military Network Analysis*, 13 December 1999. <http://www.fas.org/man/dod-101/ops/sea_angel.htm> (4 May 2000).

entry process and avoid time delays while within the state. If the United States brings in forces at a base at which it is permitted to maintain forces, US forces security personnel could process incoming personnel for both immigration and customs. To the extent US personnel will be processed by local immigration procedures at entry and exit, such procedures need to be minimized and highly simplified for members of the force, and an unambiguous entry process established. If personnel arrive at a commercial air/sea port, the presentation of a military or DoD civilian identification card and military orders could be immediately accepted as sufficient by local immigration authorities. A clear agreement as to what items US personnel must present in order to legally enter and depart from the country is imperative. Any limitations on how long they can stay within the country or at given locations must be known to the planner.

The movement and maneuver of US forces can be affected by local customs search and processing delays. Based on the long standing principle that one state may not tax or otherwise assert its sovereignty over another state, no property belonging to the US Government should be subject to customs search or fees. All property arriving in country on a US military owned or operated vessel or aircraft, and identified on the bill-of-lading as the property of the US Government should be assumed to be US property, as should all goods arriving commercially on a US Government bill-of-lading. For personal goods belonging to the personnel of the forces, customs search could be limited to agreed upon contraband, only in accordance with mutually agreed upon procedures, and only in full coordination with US forces security personnel. Even for personal property of the members, the better solution would be an agreement for US security forces to perform the actual customs inspections.

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[41] Based on a conversation some years ago between the Army JAG, who drafted and negotiated the SOFA, and the author, at the Army JAG School in Charlottesville, VA.

Goods brought by members of the force intended for personal use (versus commercial use), in reasonable quantities, should enter free of customs duty or tax. Failure to address customs matters in advance, to obtain necessary waivers, or to streamline such customs procedures as may be mutually agreed upon to apply to personal property of the members of the forces, could cause dramatic delays in bringing personnel, equipment and supplies into the foreign state.

Potential time delays in access to and use of military vehicles in another state because of local laws could seriously hinder the abilities of US forces to move and maneuver within that state. All US forces vehicles should be exempted from vehicle safety/environmental inspections and requirements. Drivers of official vehicles should not be required to obtain local drivers' licenses to drive official vehicles. A determination by US forces that an individual is competent to drive an official vehicle should be binding on the foreign state. Speed limit laws, especially for oversized and over weight vehicles, may need to be reviewed. Limitations on the movement of explosives, oversized and over weight vehicles, and tracked vehicles should be explored. Due to local laws, it may prove faster to move these things by rail rather than road, when onward movement by air is unavailable.

The authority of forces personnel to control activities within facilities and areas that they occupy should be as pervasive as possible. For example, US forces security personnel should retain the power of service of process, investigation, search and seizure, and arrest. This will avoid time-consuming confrontations between US personnel and local authorities over attempts to come into US occupied facilities and areas to enforce their domestic laws, and will move genuine disputes up to the government-to-government level.

VII. Factor *Information*: SOFAs and Bandwidth

Commanders of deployed US forces rely heavily upon electro-magnetic communications for command and control capabilities. Many tactical devices emit electro-magnetic waves for other "information" purposes. As the US military shifts to an information intensive mode of managing battlespace, the need for access to various frequencies of the electro-magnetic spectrum, will increase dramatically. Now that combat/contingency sensors may be separate from the weapons platforms, as well as being distant from the C^2 systems, there is a concomitant requirement that each communicate with the other, and in many instances the means will be electro-magnetic emissions. Use of frequencies of the electro-magnetic spectrum within another state's sovereign territory is controlled by the laws of that state. The operational planner must not presume unlimited access to any or all frequencies.[42]

Some states may limit the types of electro-emitting equipment that may operate within its territory, as well as the power levels for emissions. Restrictions on types and uses of equipment, as with restrictions on frequencies, may limit the planner's options and deprive US forces of the use of critical capabilities. Hence, the free flow of information to, from, and within the battle/contingency space may require a prior agreement with relevant foreign states.[43] Such agreements may, when needed, be included as a portion of a SOFA.

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[42] There are several instances within US Forces, Japan (USFJ), personally known to this author, in which commands purchased and deployed significant communications systems, only to discover that the frequency(ies) used by the equipment was (were) not authorized for use by USFJ in Japan. This was not merely a question of asking and obtaining permission; the frequencies were assigned to other users, and simply were not available. The net result was that the commanders were unable to use the equipment.

[43] Authority to negotiate and conclude international agreements concerning the use of US military frequencies or frequency bands is granted to CJCS for agreements concerning operational command of joint forces, and to the Assistant Secretary of Defense for C^3I for all others. DoD Directive Number 5530.1, §13.8.1, § 13.8.2.

VIII. Conclusion

As the types of missions performed by US military forces becomes more and more oriented toward contingencies and crisis management around the world, US military commanders will find it increasingly difficult to have their forces at the right place and time, with the right equipment, unless they address the legal issues imbedded in the operational factors of *space, forces, time*, and *information*. It is neither necessary, nor advisable, that operational planners attempt to become legal experts. But they require sufficient familiarity with the legal issues within operational factors, to be aware of problem areas in their courses-of-action.[44] The legal systems of sovereign states may deny US military forces access to *space* that will make the difference between success and failure for military missions. Other laws may impede or impair the movements of forces to the extent that there is insufficient *time* to effectively complete a mission. Foreign laws may restrict other activities of US *forces*, equipment or supplies such that they will no longer be able to perform the tasks assigned them. Local restrictions on the use of electro-magnetic generating equipment and the frequencies upon which it relies, may deny *information* critical to US forces attaining their military objective. Planners who address these potential obstacles in a transit agreement or SOFA, in sufficient time to neutralize them, will provide their commanders with more effective and efficient ways to accomplish their commander's objectives.

> *The end for which a soldier is recruited, armed and trained, . . .* ***is simply that he should fight at the right place, and the right time.***[45]

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[44] A corollary to this requirement is that planners include legal advisors on the planning teams from an early point, rather than waiting to seek legal review at or near the completion of an operational plan. Negotiating a solution to a problem with a foreign government is not always a speedy process.

[45] *Carl Von Clausewitz on War*, 95.

ENDNOTES:

[Ψ] The author of this paper is currently on leave from his "dual hatted" position as Chief of International Law for Headquarters, US Forces, Japan (USFJ), and for Headquarters, Fifth Air Force (5 AF), at Yokota Air Base, Japan. He has worked since 1992 as the primary advisor to the commander of USFJ for International law matters, including matters relating to the US-Japan Status of Forces Agreement. Prior to this, he served as Chief of International Law for US Army, Japan. He is also a retired US Army judge advocate reservist, having served on active duty in Japan, Korea, and Guam.

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